**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 05 February 2007**

*In the Matter of*
**E.J.F.**
Claimant
v. Case No. 2005 BLA 05664

**PEABODY COAL COMPANY**
Employer

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS**
Party-in-Interest

APPEARANCES:[1]
Joseph E. Wolfe, Esquire
Claimant
Philip J. Reverman, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

# DECISION AND ORDER
## *DENIAL OF CLAIM*

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer on January 4, 2005. Director's Exhibit ("DX") 27.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

An initial claim was filed. DX 2. The District Director determined that the Claimant established the medical issues and rendered a Proposed Decision and Order. A hearing was held scheduled for Owensboro Kentucky on September 26, 2006. However, I held a

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

telephone conference and the hearing was continued as Claimant waived the formal hearing. The parties presented a joint stipulation to me on or about November 14, 2006:

1. The claim was timely filed.
2. The Claimant was a miner within the meaning of the Act.
3. The Claimant had at least 22 years of work as a coal miner.
4. Peabody Coal Company is the Responsible Operator of the claim.
5. Peabody Coal Company has secured the payment of benefits.
6. The Claimant's most recent period of cumulative employment of not less than 1 year was with Peabody Coal Company.
7. That the evidence contained in the director's exhibits supportive of the claimant and as designated by the claimant in the previously submitted evidence summary and attached hereto as Exhibit A, shall be deemed designated as support of his claim for benefits.
8. That the evidence contained in the Director's exhibits supportive of the Employer and as designated by the Employer in the previously submitted evidence summary and attached hereto as Exhibit B, shall be deemed designated as support of his claim for benefits.
9. The medical report of Dr. J. Wesley McConnell dated August 2, 2006, is to be admitted into evidence without objection as Claimant's Exhibit No. 1
10. The medical report of Dr. Harold Spitz dated April 29, 2006 is to be admitted into evidence without objection as Employer's Exhibit No. 1
11 The medical report of Dr. Lawrence Repsher dated April 28, 2005 is to be admitted into evidence without objection as Employer's Exhibit No. 2.
12. The medical deposition of Dr. Wesley McConnell dated June 29, 2006 is to be admitted into evidence without objection as Employer's Exhibit No. 3.
13. The medical report of Dr. Gregory Fino dated September 23, 2005 is to be admitted into evidence without objection as Employer's Exhibit No. 4.

On November 21, 2006 I held a second telephone hearing. 32 Director's Exhibits (DX 1-DX 32) were admitted into the record for identification. See transcript, "TR" 5-6. Although the Claimant identified one exhibit, at the time of the second telephone conference, it was not submitted to this office until later. I now admit it into evidence as Claimant's exhibit "CX" 1. Four Employer's exhibits ("EX" 1 – EX 4) are admitted without objection. I marked the stipulations as Administrative Law Judge exhibit "ALJ" 1 for identification. Post telephone hearing, I left the record open to give the parties the right to brief this case by January 22, 2007. Both parties filed briefs.

The Claimant is 76 years-old and has spent 22 years in the coal mining industry (DX 2).

## APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

## STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The timeliness of the claim is no longer being contested. TR 10.

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

I have reviewed all of the evidence in the record and no evidence exists to rebut the presumption.

I accept the above stipulations.

## REMAINING ISSUES

1. Whether the miner suffers from pneumoconiosis.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. If so, whether the miner's disability is due to pneumoconiosis.

## BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers'

proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

**MEDICAL EVIDENCE SUMMARY**

**X-rays**

| Exhibit No. | Physician | BCR/BR | Date of film | Reading |
|---|---|---|---|---|
| DX 11 | Simpao | | 9/17/04 | 1,0[5] |
| DX 25 | Wiot | B/BCR | " | Negative |
| EX 2 | Repsher | B | 4/7/05 | Negative |

The Employer also listed EX 1, a report of Dr. Spitz as rebuttal of a March 19, 2004 x-ray, but after a review of the record, there is no proffered Claimant x-ray to rebut.

**Pulmonary function studies**

| Exhibit No. | Physician | Date of study | Tracings present? | Flow-volume loop? | Broncho-dilator? | FEV1 | FVC/ MVV | Coop. and Comp. Noted? |
|---|---|---|---|---|---|---|---|---|
| CX 1 | J.W. McConnell | 10/12/04 | Yes | Yes | No | 1.81 | 2.46 | |
| EX 2 | Repsher | 4/7/05 | Yes | Yes | Yes | 1.59<br>1.21 | 2.19<br>1.73 | Poor<br>Invalid |
| EX 4 | Fino | Review of DX 11 and 13 | The testing is invalid due to premature termination and lack of reproductibility | | | | | |

The Claimant did not identify the spirometry performed March 19, 2004, DX11, when requested for evaluation under the rules for limitation on evidence. That testing was determined to be invalid and the Claimant was retested by Dr. Simpao on May 13, 2004, DX 13. That testing produced an FEV1 of 2.13 and an FVC of 3.03. DX 13. That testing was also not identified in

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Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

[5] This x-ray was read for quality purposes only by Peter Barrett, M.D., B, BCR, who found it was top in film quality. DX 12.

Claimant's Exhibit A, attached to the Stipulations, which are incorporated by reference as if fully set forth at full length.

**Blood gas studies**

| Exhibit No. | Physician | Date of Study | Altitude | Resting (R) Exercise (E) | PCO2 | PO2 | Comments |
|---|---|---|---|---|---|---|---|
| EX 2 | Repsher | 4/7/05 | 0-2999 | R | 40.6 | 84 | Normal |

The Claimant did not refer to the blood gas studies performed on March 19, 2004. DX 11. However, they were noted as "normal" by Dr. Simpao.

## Medical Reports

*Valentino Simpao, M.D.*

Dr. Simpao, a Family Practitioner, conducted an examination of the Claimant on March 19, 2004 at the request of the Department of Labor. He noted that the miner has a history of heart problems with recent triple bypass heart surgery with insertion of a pacemaker, and had 25 years of coal mine employment in surface mining. The Claimant alleged sputum production with dark secretions, wheezing, mostly at night when lying down, shortness of breath, daily productive cough, orthopnea, ankle edema and nighttime shortness of breath. Based on the x-ray reading and based on the testing, Dr. Simpao determined that the Claimant was totally disabled due to pneumoconiosis. DX 11.

After the Department of Labor determined that the testing was invalid, the Claimant was re-examined. Spirometry showed "moderate" restrictive and obstructive disease. DX 13. An x-ray taken at the time was discounted by the Department of Labor because it was a digital x-ray. DX 15. In an interrogatory completed after the second examination, Dr. Simpao determined that due to multiple years of coal dust exposure, and relying on the testing, pneumoconiosis contributed to total disability. DX 14. Cyanosis was noted. Again, the x-ray reading and the "moderate" restrictive and obstructive disease were noted.

*J.W. McConnell, M.D.*

The Claimant submitted testing performed by Dr. McConnell, board certified in internal medicine and pulmonology. DX 24, EX 3. He determined that pneumoconiosis contributed to a restrictive lung disorder. He also determined that Claimant was totally disabled due to pneumoconiosis. However, However, when his deposition was taken on June 29, 2005, Dr. McConnell stated that he himself had never had any chest x-rays taken of the Claimant and that his records on the Claimant show no indication that the Claimant had ever been diagnosed with pneumoconiosis by chest x-ray (EX 3, 20-21). Dr. McConnell also stated that, in terms of a diagnosis of legal pneumoconiosis, the Claimant would also need an abnormal chest x-ray consistent with exposure to coal dust and a history of exposure to coal dust. Id .,23.

In a note dated August 2, 2006, Dr. McConnell stated the Claimant is totally disabled from pneumoconiosis. CX 1.

*Lawrence Repsher, M.D.*

Dr. Repsher, board certified in internal medicine and pulmonology, examined the Claimant for the employer on April 7, 2005. The Claimant presented as a 74-year-old, white man, who worked as a coal miner for 23 1/2 years, all aboveground. The last coal mine

employment was as a dozer operator for 18 years. He retired due to chronic anxiety. The Claimant alleged progressive dyspnea on exertion for the past 15 years, as well as a chronic cough productive of "scant to moderate" brown/white phlegm. His weight has been stable, around 212 to 215 pounds. Ankle edema was noted. The Claimant told Dr. Repsher that he had been diagnosed with "asthmatic bronchitis". An x-ray and a CT scan both showed no evidence of coal workers pneumoconiosis, but a pacemaker was noted.

Pulmonary function tests were inconclusive due to "extremely poor effort and cooperation with testing. However, the relatively effort independent tests of lung volumes and diffusing capacity are normal, which would rule out any clinically significant interstitial lung disease such as pneumoconiosis." Arterial blood gases were normal, a carboxyhemoglobin, "which along with the nondetected serum nicotine and cotinine levels are consistent with his current stated non-smoking status." A resting electrocardiogram depicted a complete left bundle branch block. CBC tests were indicative of a microcytic anemia, consistent with recent colon cancer. The sedimentation rate was increased "for unclear reasons". A comprehensive metabolic panel is normal, except for borderline elevated glucose and an elevated CO2, which is noted as a probable laboratory error, "since it is entirely inconsistent with the ABGs".

Based on the examination, Dr. Repsher determined:

1. No evidence of coal workers pneumoconiosis.
2. No evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust.
3. Coronary artery disease, severe, status post implantation of dual chamber pacemaker and early left ventricular congestive heart failure, manifested.
4. Hypertension, unknown cause, with probable HCVD with diastolic dysfunction.
5. Possible early diabetes mellitus.
6. Possible intermittent claudication of left lower extremity.
7. Asthmatic bronchitis by history, not documented.
8. Status post resection of colon cancer, with no evident recurrence, not requiring chemotherapy.

9, Status post bilateral lOLs and recent retinal hemorrhage.

EX 2.

*Gregory Fino, M.D.*

Dr. Fino, also a board certified internist and pulmonologist, reviewed medical records for Employer. EX 4. Based upon his review of those records, Dr. Fino stated that Claimant has normal lung function and no evidence of pulmonary impairment. According to Dr. Fino, Dr. Simpao provided no valid, objective evidence of any respiratory impairment or pulmonary disability. "There was definitely no cyanosis that could be attributed to any lung disease. In order for lung disease to cause cyanosis, there has to be a decrease in the p02 values to levels below 60. This man had normal room air arterial blood gases and normal oxygen saturations with exercise. There is absolutely no evidence at all of any hypoxemia that could account for cyanosis."

He also reviewed the information from Dr. McConnell, and noted:

> I do not agree with Dr. McConnell that this man has any type of oxygen transfer problem, diffusing capacity problem or abnormality in the lung function studies.

> All of the spirometries were nonconforming or invalid. There is no objective evidence of any obstructive or restrictive ventilatory impairment.

Id.

***"Other" Medical Evidence***

| Exhibit No. | Physician | Date of Medical Report | Type of Procedure | Comments |
|---|---|---|---|---|
| EX 2 | Repsher | 4/07/05 | CT | No pneumoconiosis. |

## FINDINGS OF FACT

### *Pneumoconiosis*

### Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

*X-ray Evidence*

The record I consider under the rules for limitations on evidence involves three readings of two x-rays. The Claimant relies on the one reading by Dr. Simpao, who is not a B reader. CX 1. The other x-rays were read as negative.

The weight I must attribute to the x-rays submitted for evaluation with the current application is in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that of the readers of record, Dr. Wiot is a dually qualified board certified radiologist B reader and is the best qualified.

I note that the preponderance of the readers do not find pneumoconiosis.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her

[6] 20 C.F.R § 718.201(a).

[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

I also note that the most recent x-ray is negative. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co.***, 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp.***, 9 B.L.R. 1-;131 (1986).

In this case, the number of negative x-rays and expert opinion of the most qualified readers dictate a conclusion that pneumoconiosis has not been established by x-ray. This determination is substantiated by the fact that the most recent x-rays are negative.

*Biopsy and Presumption*

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. Other presumptions are not applicable.

*Medical Reports*

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

I note that the CT scan is negative, but I do not accord CT scans any significant weight as to legal pneumoconiosis. I find that as the x-ray evidence does not support a diagnosis of pneumoconiosis, clinical pneumoconiosis is not proven.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

I do not find the reports or opinions of Dr. McConnell are helpful as he vacillated to the rationale for his diagnosis in the deposition. A report may be given little weight where it is internally inconsistent and inadequately reasoned. ***Mabe v. Bishop Coal Co.***, 9 B.L.R. 1-67 (1986). See also ***Cranor v. Peabody Coal Co.***, 22 B.L.R. 1-1 (1999) (en banc on recon.). I also note that he did not fully comprehend the concept of legal pneumoconiosis. EX 3 at 23. By definition, legal pneumoconiosis does not require a positive reading of an x-ray. The note dated

August 2, 2006 that states that the Claimant is totally disabled from pneumoconiosis (CX 1) is not helpful to a rationale for legal pneumoconiosis. Therefore I attribute little weight to the diagnosis.

Dr. Simpao diagnosed both clinical and legal coal workers' pneumoconiosis based upon pulmonary function tests, physical findings, spirometry, and the number of years in his occupational history, clinical findings and symptomotology of the Claimant. Dr. Simpao noted "moderate" restrictive and obstructive disease.

Dr. Fino, who did not examine the Claimant, rendered an opinion that there is no respiratory deficit established on testing in this record. For example, Dr. Fino pointed out that Dr. Simpao's Finding of cyanosis caused by a lung problem was not plausible (EX 4, 6). Dr. Fino stated that, in order for lung disease to cause cyanosis, there had to be a decrease in the $PO_2$ value to a level below 60, but, in the Claimant, his arterial blood gas studies were completely normal, as was oxygen saturations with exercise (EX 3, 6).

A 'reasoned' opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. ***Fields v. Island Creek Coal Co***., 10 B.L.R. 1-19 (1987). Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. ***Clark v. Karst-Robbins Coal Co***., 12 B.L.R. 1-149 (1989)(en banc).

In reviewing whether Dr. Simpao submitted a well reasoned report, I note that whereas the Claimant alleged shortness of breath, wheezing, cough and mucus production, the physical examination did not show any pulmonary abnormalities. Specifically there were no rales, rhonchi, rubs or wheezes heard on examination of the lungs. There was no physical examination evidence of any type of lung condition. Cyanosis constituted the only significant abnormality on the physical examination, that fits the rationale for legal pneumoconiosis.

There are no reliable office notes or hospital records to substantiate the symptoms. Dr. Repsher's examination did not note any positive findings consistent with pneumoconiosis.

The Department of Labor discounted pulmonary function tests in the first examination as unreliable. The results of the second spirometry tests are also in dispute.

However, Dr. Simpao relies on the symptomology as a major premise of his logic without considering that none of it is fully substantiated. The challenged spirometry does not fully support a diagnosis. It may be that Dr. Fino is incorrect about the cyanosis, but without an explanation, the opinion is not well reasoned.

The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. §718.202(a)(4) (2001). I find that Dr. Simpao failed to submit a "reasoned medical opinion" that establishes that legal pneumoconiosis is established in this record.

## CONCLUSION

In summary, the Claimant has not established the presence of pneumoconiosis. I find that the Claimant has failed to establish a required element of proof. ***Oggero v. Director, OWCP***, *supra.* As a result, because this is an initial claim, there is no need to evaluate the remainder of the issues. Therefore, his claim for benefits is denied.

## ORDER

It is ordered that the claim of **E.J.F**. for benefits under the Black Lung Benefits Act is hereby **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).